release. As I interpret sub-section (4) it is no more than an intimation by the legislature that once a motor vehicle has been seized by a Road Transport Officer pursuant to sub-section (2), then the Court before which the prosecution is held must make an order for forfeiture or for release. If there is a prosecution then on a proper application permission is extended to the Court to make either of those orders provided there has been seizure even though that prosecution has not been successful. And, finally, (sub-section (5)) if there is no prosecution within one month then the vehicle must be released by the Road Transport Officer.

Appeal allowed.

THE PERAK HAULIERS LTD. v. THE CYCLE & CARRIAGE CO. LTD.

[C.A. (Hill Ag. C.J., Good J.A. and Ong J.) July 28, 1961]

[Ipoh — F.M. Civil Appeal No. 15 of 1961]

Landlord and tenant — Recovery of possession — Landlords requiring premises for their own business — Meaning of "business" — Meaning of "other accommodation" as distinct from "suitable alternative accommodation" — Hardship — Control of Rent Ordinance, 1956, s.12(1)(f) and (n).

Practice and Procedure — Costs under s.13 of the Control of Rent Ordinance, 1956 — Discretion.

The respondents, the owners of the premises claimed, were carrying on the business of importer, dealer and repairer of various makes of motor-cars, trucks, buses and motor-cycles. A portion of these premises was occupied by their agents and the remainder by the appellants who were carrying on a road haulage business from those premises and from other premises of their own situated about 2½ miles away. The respondents claimed possession of the portion occupied by the appellants on the ground that they reasonably required the space for the purpose of carrying on their own business. Photographic evidence showed that the respondents' agent's showroom in the premises was utterly inadequate for a good display of motor vehicles. There was also evidence to show that other accommodation was available to the appellants. An order for possession was made against the appellants.

The appellants appealed on the grounds: (1) the respondents did not require the additional space for the purpose of carrying on their own business; (2) it was not proved that other accommodation was available for the appellants; and (3) they would suffer hardship.

Held: (1) *per* Good J.A., that the respondents reasonably required the premises for their own business; *per* Ong J., that it was not open to the appellants to urge this ground on appeal, and further, the words "for the purpose of carrying on his own business" should not be construed in a restricted and technical sense to mean only such business as is carried on directly by a party and in his own name. *Weiner* v. *Harris* (9) applied, *Haynes* v. *Ford* (10) considered;

(2) "other accommodation" in paragraph (f) of section 12(1) of the Control of Rent Ordinance, 1956, must be distinguished from "suitable alternative accommodation" in paragraph (n). The accommodation which must be shown to be available for the purposes of paragraph (f) need only be adequate accommodation, whereas "suitable alternative accommodation" in paragraph (n) implies some measure of quality or amenities in addition to a purely quantitative measure. On the facts, the respondents have discharged the onus of proving that other accommodation was available to the appellant;

(3) the appellants failed to prove hardship but only relative inconvenience to themselves and their customers;

(4) when the Court exercises its discretion to condemn the unsuccessful party in costs it should be made clear in the judgment that such order is made in the exercise of discretion under the proviso to section 13, whether or not any reasons are given.

Cases referred to:—

(1) *Aitken* v. *Shaw* [1933] S.L.T. (Sh. Ct.) 21.
(2) *Epsom Grand Stand Association Ltd.* v. *Clarke* (1919) 35 T.L.R. 525.
(3) *Sims* v. *Wilson* [1946] 2 All E.R. 261.
(4) *Maguire* v. *Stewart* [1950] S.L.T. (Sh. Ct.) 22.
(5) *Nevill* v. *Hardy* [1921] 1 Ch. 404.
(6) *Parker* v. *Rosenberg* [1947] 1 K.B. 371, 377.
(7) *Coplans* v. *King* [1947] 2 All E.R. 393.
(8) *Smith* v. *Perry* [1947] 1 K.B. 230, 233.
(9) *Weiner* v. *Harris* [1910] 1 K.B. 285, 291, 294.
(10) *Haynes* v. *Ford* [1911] 2 Ch. 237, 248, 249.

CIVIL APPEAL.

B.K. Das (*N. Sharma* with him) for the appellants.

S.A. Raj for the respondent.

Cur. Adv. Vult.

Hill Ag. C.J.: I have had the advantage of reading the judgments of my brothers Good and Ong with which I agree and to which I have nothing to add.

Good J.A.: In Brewster Road in the town of Ipoh, on a site convenient for business in the sense that it is both central and accessible, is a large single-storey building owned by the respondents. I am, like my brothers Hill and Ong, a former resident of Ipoh and I know the building well. I have driven past it thousands of times and I have been inside it more than once. The excellent photographs which form part of the record have refreshed my memory of what it looks like both inside and outside.

Part of the space in the building is let to Ipoh Motors Limited, a company carrying on business as dealers in motor cars. The remainder is let to the appellants who are carriers of goods and they in turn have sub-let part of their space to a firm dealing in paint.

The part occupied by Ipoh Motors has been described as a motor show-room and workshop; but the expression "show-room" would convey an entirely false impression to anyone who was familiar only with the kind of motor show-rooms which are to be seen in any large city, in which the latest masterpieces of the motor car designers are displayed in glittering splendour with space enough to enable would-be purchasers or hopeful dreamers to stand back and admire the beauty of line and balanced proportions of the newest models. A glance at the last two photographs in Exhibit P 2 will show how new motor cars have to be crammed into the limited space available in the show-room of Ipoh Motors, so that it is quite impossible to make a proper visual comparison of the different models on sale, while to

take any particular model out for demonstration must require much shunting and involve a considerable waste of time.

If display for the purposes of advertisement is an essential part of the business of selling motor-cars — and, for myself, I would take judicial notice that it is — then the existing showroom which has been referred to in this case is manifestly inadequate for its purpose.

The present respondents as plaintiffs in the action in the High Court sought an order for possession of that part of the premises which is let to the appellants. They claimed that they reasonably require the space for the purpose of carrying on their own business. The relevant portions of section 12(1) of the Control of Rent Ordinance, 1956, on which the respondents rely are as follows:—

"12(1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

... ...

(f) where the owner of the premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and —

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the Court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

Provided further that in the case of premises being used by the tenant for business, trade or professional purposes an order or judgment shall not be made or given on any grounds specified in this paragraph unless the Court is satisfied that the owner requires them for the purpose of carrying on his own business, trade or profession."

The main grounds on which the appellants rely in the present appeal are (a) that the respondents do not require the additional space for the purpose of carrying on *their own* business; (b) that it was not proved that other accommodation was available for the appellants; and (c) that they will suffer hardship if an order for possession is made while the respondents will suffer no hardship if it is not made.

The question whether the respondents reasonably require the space for the purpose of carrying on their own business raises the further question of the relationship existing between themselves and Ipoh Motors Limited. It was submitted on behalf of the appellants that this relationship had not been proved; but I think that on the pleadings and the evidence it is perfectly clear. The respondents in paragraph 1 of their statement of claim stated as follows:— "The plaintiff is a Limited Company incorporated in Singapore and carrying on business of importer, motor dealer and repairer in Singapore and the Federation of Malaya." That paragraph was expressly admitted by the appellants in their statement of defence and they added that "Ipoh Motors Ltd., Ipoh are the agents of the plaintiffs at Ipoh and the plaintiffs already carry on their business at Ipoh through their said agents at No. 68 Brewster Road, Ipoh." The secretary to the respondent company, P.W.1, stated that his company are motor dealers and agents for a number of makes of motor cars, that his company has no interest in Ipoh Motors and no written agency agreement with them but that Ipoh Motors do all his company's business. This last statement is ambiguous: it may mean that Ipoh Motors sell motor cars imported by the respondents to the exclusion of all other makes, or it may mean that all motor cars imported by the respondents which are sold in the area supplied from Ipoh are sold by Ipoh Motors and nobody else. This ambiguity is, however, immaterial. The respondents have their head office in Singapore. If they want to sell motor cars in the Federation they must either open branches in the Federation or they must sell through agents in the Federation. The evidence is that they do both. They have had branches at Kuala Lumpur and at Batu Pahat in Johore. It was brought to our notice that an announcement appeared in the press on 30th June, 1961 to the effect that the Kuala Lumpur branch would be taken over by a new company, the Cycle and Carriage Company (Malaya) Limited, on 1st July. We allowed the publication to be proved, but the fact itself was not proved, nor could its proof have had any effect upon the issue. The only fact that has any relevance in this connection is that the respondents have no branch in Ipoh and if they want to sell their motor cars in that part of the Federation they must do so through agents. The learned trial Judge has dealt with this question at some length. He had clear evidence before him that Ipoh Motors were the agents of the respondents for the purpose of selling motor cars in Ipoh. On the evidence and in the light of the admissions in the defendants' pleadings I would agree with his inferential finding from the primary facts that the respondents carry on their own business at 68 Brewster Road, Ipoh through their agents, Ipoh Motors Limited.

It follows from what I have said that I am of the opinion, in which I agree with the learned trial Judge, (a) that the respondents reasonably require that part of the premises which is let to the appellants and (b) that they require it for the purpose of carrying on their own business. It was suggested by counsel for the appellants that the respondents did not really require the premises, that they only wanted or desired them. *Megarry*, at p. 258 of the 9th edition, quoting from the Scottish case of *Aitken* v. *Shaw* [1], the report of which is not available here, says:

"The landlord must show 'a genuine present need' for the house and not be 'moved by considerations of preference and convenience merely . . . . . The words

'reasonably required' connote something more than desire, although at the same time something much less than absolute necessity will do."

In my opinion the respondents have shown that they need the additional space in their own building for the proper display of motor cars which it is their own business to sell. To that extent, therefore, they have discharged the onus of proof which, in this respect, lies on them: *Epsom Grand Stand Association, Ltd.* v. *Clarke* (2).

I come now to the question of greater hardship, which includes the question whether other accommodation is available for the owners or the tenants. The first proviso to paragraph (f) of our section 12(1) is, *mutatis mutandis*, identical with the proviso to paragraph (h) of the First Schedule to the 1933 Act in England — the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 — which contains the law at present in force in England. The second proviso to our paragraph (f) does not occur in the English Act because that Act applies only to dwelling-houses and not to business premises. The proviso to paragraph (h) of the First Schedule to the English Act has been the subject of many judicial decisions on appeal from the County Courts to the Court of Appeal, and a number of principles have become well established.

Firstly, the onus of proving that greater hardship would be caused by granting the order than by refusing to grant it lies upon the tenant: *Sims* v. *Wilson* (3). Secondly, the test is hardship, and not mere inconvenience: *Maguire* v. *Stewart* (4) (cited by *Megarry* at p. 264 of the 9th edition, but the report is not available here). Thirdly, the onus of proving that other accommodation is available for the tenant is upon the landlord: *Nevill* v. *Hardy* (5). Fourthly, on an appeal, the Court will be slow to interfere with the decision of the trial Judge on the balance of hardship which is primarily a question of fact: *Sims* v. *Wilson, supra*; *Parker* v. *Rosenberg* (6); *Coplans* v. *King* (7). To succeed, an appellant must "show that the County Court Judge misdirected himself on a question of law or that he based his judgment on some finding of fact of which there was no evidence": *Smith* v. *Perry* (8) (*per* Somerville L.J. at p. 233).

It is to be noted that paragraph (f) of section 12(1) says nothing about "suitable" accommodation being available. The expression "suitable alternative accommodation" occurs in paragraph (n) and it seems clear to me that the legislature must have intended some distinction between that phrase and the phrase "other accommodation" which occurs in paragraph (f). In my view the accommodation which must be shown to be available for the purposes of paragraph (f) need only be adequate accommodation, that is to say accommodation containing space adequate for the purposes for which it is required by the tenant, whereas suitable alternative accommodation in paragraph (n) implies some measure of quality or amenities in addition to a purely quantitative measure.

The evidence is that there is a building in Lahat Road, Ipoh owned by a bus company in which five bays are occupied by Ipoh Motors Ltd., under a monthly tenancy, for the storage of new vehicles, and that these five bays and two additional bays can be made available for the appellants at any time. This evidence was given by a director of the company which owns the Lahat Road premises and though the appellants have objected that no copy was produced either of a resolution by the directors to let this space to them or of a resolution by the directors of Ipoh Motors to vacate it, I consider that the learned trial Judge was entitled to find on the evidence before him that this space will be available for the appellants if and when the appellants vacate that part of the respondents' premises in Brewster Road which they now occupy.

But that is not the whole story so far as this aspect of the case is concerned. The appellants have premises of their own two and three-quarter miles out of Ipoh on the Kuala Kangsar Road. They own two acres of land on which there are substantial buildings as shown in the photographs in Exhibit P.1. There is not a shred of evidence to indicate that the appellants' premises in Kuala Kangsar Road are not quantitatively adequate for the purpose of carrying on their business. The floor area of the buildings is 540′ x 130′. The appellants' objection to the inadequacy of the Kuala Kangsar Road premises is based not on size but on two other factors: (a) lack of security for valuable goods and (b) the fact that the removal of their office from the centre of town to a place two and three-quarter miles away would reduce the volume of their business by about 70 per cent.

So far as the question of security is concerned, the chain link fence surrounding the Kuala Kangsar Road site would appear to provide some substantial measure of protection and any additional security measures which the appellants might think it necessary to take would come under the heading of special amenities which might well be covered by "suitable alternative accommodation" under paragraph (n) but which in my view are not required to be available under the heading of "other accommodation" in paragraph (f).

With regard to the question of loss of business to the appellants if they have to move their office to Kuala Kangsar Road, I share the learned trial Judge's inability to accept the pessimistic view expressed by the appellants' Managing Director, D.W.1. The law requires every person whose business is carrying goods for hire or reward to obtain a haulage permit from the Road Transport Department and it is common knowledge that the issue of haulage permits is restricted to approved applicants and that they are not distributed wholesale. It is obvious that much of the business of haulage contracts will be done over the telephone and in the last resort it could be no serious discouragement to potential

customers to have to call at an office two and three-quarter miles away. In any event, I am of the opinion that the convenience of having an office in town where haulage orders can be booked is an amenity to which the tenant is not entitled under paragraph (f).

For these reasons I would agree with the findings of the learned trial Judge (a) that the respondents have discharged the onus of proving that other accommodation is available for the appellants and (b) that the appellants have failed to discharge the onus of proving greater hardship. On the evidence, I would go further than the learned trial Judge and hold that the appellants have proved no hardship at all, but only relative inconvenience to themselves and their customers. I am unable to find any grounds for interfering with any of the findings of the learned trial Judge.

I would dismiss the appeal except as regards the costs of the action and I would make the same consequential orders as are set out in the judgment of Ong J. which I have had the advantage of reading and with which I agree.

Ong J.: This is an appeal by the tenant of controlled premises against the decision of the High Court at Ipoh ordering that vacant possession of the premises be delivered to the landlord within three months, that the tenant pay all the arrears of rent due from December 1, 1958 at the rate of $550 per month and that the tenant pay the landlord's taxed costs of the action. It will be more convenient to refer to the appellant and respondent hereinafter as defendant and plaintiff respectively.

The plaintiff in the action is a limited liability company incorporated in Singapore and carrying on the business of importer, dealer and repairer of various makes of motor cars, trucks, buses and motor-cycles in Singapore and in its Federation branches at Kuala Lumpur and Batu Pahat. The company is the owner of premises, No. 68, Brewster Road, Ipoh, of which one portion is occupied by its own agents, Ipoh Motors Ltd., and the remainder by the defendant, also a limited liability company, which carries on a road haulage business from those premises and from other premises of its own situated about 2¾ miles away in Kuala Kangsar Road, Ipoh.

By a written notice the plaintiff duly terminated the defendant's contractual tenancy on November 30, 1958, and upon the latter's refusal to deliver up vacant possession the plaintiff issued the writ in the action on April 21, 1959. There had been no change by purchase in the ownership of the premises since February 15, 1942 and the plaintiff rested its claim specifically on the ground set out in paragraph (f) of section 12(1) of the Control of Rent Ordinance, 1956. The relevant portion of that paragraph reads as follows:

> "12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —
>
> xxx xxx xxx xxx xxx
>
> (f) where the owner of the premises reasonably requires the same for occupation by himself . . .
>
> Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it;
>
> Provided further that in the case of premises being used by the tenant for business . . . purposes . . . the Court is satisfied that the owner requires them for the purpose of carrying on his own business . . . ."

The defendant by its defence disputed the plaintiff's claim on the grounds that the plaintiff already carried on business on the premises by its agents; that the plaintiff did not reasonably require the premises for its own occupation; that no suitable alternative accommodation was available to the defendant and lastly that very great hardship would fall on the defendant by the grant of the order. The defence also raised the issue of what was the maximum recoverable rent which I shall deal with in the concluding portion of my judgment as well as the question of costs.

Since the facts of this case were not set out by the learned trial Judge in his judgment I shall have to do so at some length, though I regret the necessity. According to Lim Nyit Siong, secretary to the plaintiff company, his company is agent for about a dozen makes of vehicles. Its Ipoh agents have been remunerated for their services on a commission basis. It has no branch in Ipoh or elsewhere in Perak, the vehicles it deals in being sold through Ipoh Motors Ltd. It claimed the portion occupied by the defendant on the ground that the show-room at Ipoh Motors was highly inadequate for a good display of motor vehicles, of which two makes alone comprise a total of 16 different models. Such lack of space, in fact, compelled the plaintiff to put in store elsewhere vehicles which otherwise should have been on display. In addition the plaintiff had been disabled from providing its customers the after-sales service which customers normally do expect and are entitled to expect from automobile dealers.

There is no evidence as to the actual area of Ipoh Motors' show-room space, but the photographs produced clearly establish in my opinion its utter inadequacy for the purpose, and, so far as this point is concerned, the fact was never disputed by the defendant. Although the learned trial Judge expressed no finding on it, I am satisfied that this was a point of substance which he did not omit to take into account in considering the question of reasonable requirement, and that he only refrained from stating the obvious.

The defendant's tenancy comprised 8,100 sq. feet of floor space, out of which it had been

able to spare 1,800 sq. feet to sub-tenants operating a paint-shop in no way connected with the haulage business. The superficial area retained by the defendant was thus 6,300 sq. feet, of which again its managing director said one-third was a workshop, although he conceded that it would be convenient to have such workshop elsewhere at its other premises at Kuala Kangsar Road or Lahat Road. The net space, therefore, which the defendant utilised for purposes connected with its haulage business was 4,200 sq. feet, or roughly one-half of the premises of which it sought to retain the whole as statutory tenant. To what use was this 4,200 sq. feet put? I shall now quote all that the defendant's managing director had said in his evidence relevant to this point:

"We have fixed long-standing customers; 30 per cent remaining over the counter business. If goods in small quantities, then brought to office, if not we receive a haulage order . . . cannot carry on business (at Kuala Kangsar Road) as it is 2¾ miles out of town. If defendants operate at Kuala Kangsar Road 70 per cent would be lost, to say nothing of staff difficulties. We depend on customers coming to office to give instructions where to haul goods . . . As to premises in Lahat Road offered today (they are) in my opinion not suitable to us because (present) premises in heart of town and really convenient for customers to come and deal with us. We have been there so long. There is no alternative accommodation which I think is suitable available to us . . . Goods brought to office for delivery are 50-60 tons per day. Hardware stored at Kuala Kangsar Road — expensive items stored here. I agree most of haulage carried out outside centre of town but negotiations would have to take place in town . . . What we need is office space plus storage space for goods that cannot be delivered the same day . . . office space is roughly 50 x 20 feet — 1/5 is occupied by sub-tenant; balance storage of goods. Kuala Kangsar Road is not safe for expensive goods . . . From business point of view we must be in town . . . My main complaint is that if office is outside town we lose contact with 70 per cent of our productive customers. We had tried to get office space accommodation apart from storage. I only tried old Sime Darby building owners. Now occupied by Overseas Chinese Bank."

Of this evidence all I need say is that he who runs can read. Of the 8,100 sq. feet over which the defendant claimed the protection of the Ordinance, it required only 800 sq. feet — a mere one-tenth of the whole — for use as an office. This is the figure arrived at after deducting 1/5th from the office space of 50 x 20 feet. The defendant's managing director also plainly intended to convey the impression that practically the whole of its business was done over the counter with customers calling at the office to give instructions. In this age of the ubiquitous telephone no Court is so naive as to accept such evidence as true. My calculations — after deductions for the sub-tenancy, the workshop and the office — leave approximately 3,200 sq. feet for storage of goods not deliverable on the same day, for which the defendant has storage room elsewhere.

I turn now to the other accommodation available to the defendant. Besides an old godown opposite Lahat Road, of which no details were given, the defendant owns slightly over 2 acres of land at the 2¾ mile Kuala Kangsar Road on which buildings for storage of goods have been erected. The area itself, as well as the photographs produced in evidence, afford the clearest proof that on its own property there is abundant room for expansion to meet the defendant's every requirement both present and future.

The judgment of the learned trial Judge has been subjected to criticism on the score that he had come to his conclusions on no evidence. If by this it is meant that he ought to have set out each and every of the primary facts found by him from which his inferences were drawn, then I agree that there are no findings of the primary facts as such in the judgment. But, as I have stated earlier, it is perfectly plain from the opening paragraph in his judgment, that he did not intend to state facts which were either admitted or not open to dispute. These primary facts are: first, as to actual requirements, the plaintiff had genuine need of more show-room space even for its agents, *à fortiori* for itself as well as for its agents: the defendant's true need was only for 800 sq. feet of office space; secondly, as to fitness, the situation of the premises on a principal thoroughfare in the heart of the town makes it pre-eminently the proper site for an automobile showroom, whereas the site of a hauliers' office is of relatively little importance so long as it is convenient to customers. Thirdly, as to freedom of choice the plaintiff had and will have no alternative to its own premises, whereas the defendant can rent and open as many offices in town as it chooses, in addition to making use of space on its own property in Kuala Kangsar Road. Fourthly, the defendant had never made any genuine attempt to seek other accommodation.

Having stated what the learned trial Judge would have found on the evidence to be the primary facts — had he not thought it unnecessary to do so — I shall now proceed briefly to deal with the various grounds of appeal.

It was contended on behalf of the defendant that because the plaintiff, under the colour of requiring the premises for itself, really wanted the premises for Ipoh Motors Ltd.. an independent company, it did not require them "for the purpose of carrying on its own business," and therefore the case is excluded by the second proviso to paragraph (f). I do not think it is open to the defendant to urge this ground of appeal. By paragraph 2 of its defence the defendant alleged as a fact "that Ipoh Motors Ltd., Ipoh are the agents of the plaintiffs at Ipoh and the plaintiffs already carry on their business at Ipoh through their said agents at No. 68, Brewster Road, Ipoh." A cardinal rule of pleading is that every allegation of fact in any pleading, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted: (O.19 r.13). The plaintiff did not file any reply joining issue upon the defence. The

allegation in paragraph 2 of the defence therefore stood as an admission, and precluded the defendant from arguing to the contrary, not only in this appeal but at the trial as well. It having been specifically pleaded by the defence that the business of Ipoh Motors was to be identified with that of the plaintiff, I fail to see how anything different could be urged without amendment of the pleadings, which had not been asked for.

In case it is thought that the above reason is not sufficient to dispose of this ground of appeal, I would add that, in my view, the words "for the purpose of carrying on his own business" should not be construed in a restricted and technical sense to mean only such business as is carried on directly by a party and in his own name. The question is essentially a question of fact to be determined according to the circumstances of each particular case. The realities of the situation have to be looked into. To mention only two examples: Boustead & Co. Ltd., and Harrisons & Crosfield (Malaya) Ltd., are agents for a large number of companies incorporated in England which own rubber estates in Malaya. If Boustead's and Harrisons & Crosfield's carry on the businesses of these rubber companies in Malaya for them, can it be argued that the companies do not carry on in Malaya the business of rubber-estate owners themselves? In the instant case, although the evidence is meagre, it is nonetheless plain that the cars imported by the plaintiff were distributed and sold by Ipoh Motors as its agents on commission. There is no shadow of a suggestion that Ipoh Motors bought its vehicles outright from the plaintiff and sold them on its own account as principals. The true legal position of Ipoh Motors, consequently, was that of mercantile agents, and the authority that I think applicable is *Weiner* v. *Harris* [9], where the question was: whether a retail jeweller, entrusted by a manufacturing jeweller with jewellery for the purpose of sale or return and who was remunerated at one-half of the profit on sales, was entrusted therewith as an independent contracting party or as a mercantile agent. Cozens-Hardy M.R., holding that he was not a buyer but an agent, said:

> ". . . . the very fact that he was to be remunerated for his services is alone, I think, almost sufficient to show that he could not be a buyer, because it is quite plain that no person who is an agent, or is to be remunerated as agent, can be allowed to buy that which he is instructed and authorised to sell."

Both Fletcher Moulton L.J. and Farwell L.J. agreed with the Master of the Rolls, and Farwell L.J., in his judgment, said:

> "Then he was to have a remuneration for selling: this is consistent with his being an agent for sale, but quite inconsistent with his being owner: an owner is not remunerated for selling his own goods."

In this connection, I must say with all respect that *Haynes* v. *Ford* [10] is by no means any authority as to the meaning of "own" in the term "own business." The whole question for determination there was: whether a vegetable dealer occupying a four-storeyed building of which he used the ground floor as his retail shop, and the second and third floors as a warehouse for storage of vegetables which were partly his own property and partly goods of others which he sold on commission, was selling from a "shop" or selling from a warehouse, the latter being prohibited by statute. It was held that the defendant was carrying on business in his own shop as distinct from a warehouse, "and it is none the less a shop because there was a warehouse accessory to the shop." The following brief passage from the judgment of Cozens-Hardy M.R. shows what the *ratio decidendi* was in that case:

> "In my opinion it is none the less a shop because it is large; it is none the less a shop because it is wholesale; it is none the less a shop because goods are partly sold on commission, and of course it is none the less a shop because it is in the immediate neighbourhood of the market."

Under the same ground of appeal is included the question of reasonable requirement of the premises by the plaintiff for its own business. I would confine myself to saying that on the facts the case for the plaintiff is overwhelming, and there was ample evidence for the learned trial Judge to have come to his decision.

As to the availability of "other accommodation" I would observe that those words in the first proviso to paragraph (f) must be read with the words immediately following, "is available for the owner or the tenant"; and that "other accommodation" must be distinguished from "suitable alternative accommodation" to be found in paragraph (n). When the landlord bases his claim on paragraph (f) it is misleading for the tenant to raise in his defence the different provisions of another paragraph in which the requirements to be satisfied by the landlord are much more stringent. Under (f) what the Judge was required to do was to weigh the respective merits in the case for each party, and I am satisfied that in so doing he could not reasonably have come to any other decision on the evidence. The defendant not only has "other premises" of its own already at Kuala Kangsar Road, but when its managing director rejected the offer of the additional premises at Lahat Road as unsuitable because less convenient than its Brewster Road office, then he unwarrantably imported into paragraph (f) demands which incorporated the requirements of paragraph (n) and showed to what lengths he was prepared to go in unreasonableness. Lahat Road is within Ipoh town itself, as any map of Ipoh will show. It is not open to the objection raised by the defendant against using its own premises in Kuala Kangsar Road on the score of remoteness from town. The availability of the Lahat Road premises was guaranteed by the plaintiff's secretary and by its witness Loh Khun whose authority to make his offer on behalf of the owners could not be questioned; indeed, it was never questioned. The offer was curtly rejected. Had the defendant been more reasonable and taken the trouble to consider such offer, an order of the Court could

have been made, without inconvenience to any party, subject to a stay until such time as the plaintiff's undertaking to make the Lahat Road premises available should have been carried out. Hence I have no hesitation in saying that the objections regarding the Lahat Road offer were entirely lacking in substance. Except for a single letter dated July 22, 1958 to the owners of 94, Brewster Road, inquiring as to the availability of such permises for rent, the defendant made not the faintest attempt to seek alternative accommodation. although had been given notice to quit since November 1957. The conduct of the defendant throughout had clearly been unreasonable and oppressive. The learned trial Judge has held, and I fully agree with him, that on the whole of the evidence greater hardship would fall on the plaintiff than on the defendant by refusing to make the order asked for. I would accordingly dismiss the appeal against the order for possession.

The appeal against the portion of the order relating to rent stands on a somewhat different footing. Counsels for both parties were apparently so preoccupied at the trial of the action with the major issue of possession that the comparatively trivial issue as to what was the maximum recoverable rent came to be overlooked altogether. The plaintiff's secretary, in examination-in-chief, deposed only to the normal rent of the Ipoh Motors portion. He was cross-examined entirely on matters which the defendant hoped to rely on to establish waiver. The defendant's managing director, however, stated at the opening of his evidence-in-chief, that the monthly rent was $550 and that he had continued to send the rent to the plaintiff after determination of the contractual tenancy. On the evidence the defendant failed to show that the contractual rent was in excess of the maximum recoverable rent. The order made by the learned trial Judge is therefore the only proper order he could have made, and I would also dismiss the appeal as to this portion of the order.

Finally, as to costs, the learned trial Judge merely stated in his judgment: "The plaintiff is entitled to its costs to be taxed by the Registrar." A rather unsual provision regarding costs has been made with regard to proceedings under the Ordinance by section 13, which reads as follows:

> "In any proceedings for the recovery of possession of any premises except on the grounds set out in paragraph (a) of sub-section (1) of section 12 of this Ordinance no costs shall be awarded to either party to the proceedings:
>
> Provided that if the Court is of opinion that either the landlord or the tenant has acted in an improper or unreasonable manner the Court may order that the landlord or the tenant, as the case may be, shall pay the whole or part of such costs as it may think fit."

Since these provisions constitute a departure from the general rule that costs follow the event, I am of opinion that when the Court exercises its discretion to condemn the unsuccessful party in costs it should be made clear in the judgment that such order is made in the exercise of discretion under the proviso to section 13, whether or not any reasons are given. It does not so appear in the judgment, and the discretion being that of the trial Judge, I do not think it would be proper to substitute our discretion for his, even if we are inclined to agree that the award of costs is justified. For my own part, I would set aside the order as to costs.

This is the appropriate place, I think to add that I have not overlooked the fresh evidence adduced on behalf of the defendant with the leave of the Court. Such fresh evidence was admitted largely because counsel for the plaintiff did not oppose the application and the Court relied on the affidavit of the defendant's solicitor assuring that such fresh evidence would have had a determining influence on the trial Judge had it been available. Having considered the whole of the evidence, however, I am of opinion that the defendant's case is so clearly devoid of merits that this evidence could have had no effect on the decision of the learned trial Judge. Moreover, a final order such as the one here, ought not in any case to be liable to be affected by the happening of subsequent events, and it was never suggested that the judgment had been obtained by fraud on the Court or other improper practice.

I would propose that the following order be made on this appeal: that, save as to the order for costs which is hereby set aside, the appeal be dismissed and the order of the High Court be affirmed except as to the date of delivery of possession by the defendant which shall be the 31st day of October, 1961 and the order of the High Court be amended accordingly. The appeal being unsuccessful except as to costs, I would order that the appellant pay to the respondent nine-tenths of the taxed costs of this appeal.

Appeal dismissed.

Solicitors: *N. Sharma; Gibb & Co.*

PUBLIC PROSECUTOR v. LOW AH SANG

[A. Cr. J. (Hashim J.) August 3, 1961]

[K.L. — Criminal Appeal No. 35 of 1961]

Criminal Law and Procedure — Prosecution — Offence under repealed law — Emergency Registration Area Regulations, 1948, reg. 18 — Emergency Regulations Ordinance, 1948 — National Registration Act, 1959, s. 24 — Emergency Regulations (Indemnity) Act, 1960, s. 11 — Constitution of the Federation of Malaya.

Criminal Procedure — Charge — Drafting.

A prosecution would now lie for an offence committed under the Emergency Regulations, 1948 when the Regulations were in force.

Observations on framing charges.

Cases referred to:—

(1) *Wicks* v. *Director of Public Prosecutions* [1947] A.C. 362.

(2) *Postlethwaite* v. *Katz* 59 T.L.R. 245.

(3) *Re T. S. Chockalingam* A.I.R. 1945 Madras 521.